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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Tehama)

CALIFORNIA OAK FOUNDATION, Plaintiff and Appellant, v. COUNTY OF TEHAMA et al., Defendants and Respondents; DEL WEBB CALIFORNIA CORPORATION et al., Real Parties in Interest and Respondents.	C066415 (Super. Ct. No. CI58258)

In this action under the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21050 et seq.), plaintiff and appellant California Oak Foundation (COF) appeals from the trial court's orders (1) denying COF's request for attorney fees under Code of Civil Procedure section 1021.5;[1] (2) discharging the writ

[1] Undesignated statutory references are to the Code of Civil Procedure.

of mandate following a remand from this court on one issue of CEQA compliance; and (3) ruling in favor of real parties in interest—Del Webb California Corporation et al. (real parties)—for costs incurred prior to the first appeal. We shall strike $15,771.25 from the real parties' cost award as unrecoverable attorney/paralegal fees. Otherwise, we shall affirm the challenged orders.

FACTUAL AND PROCEDURAL BACKGROUND

We sketch the general background here, and detail the pertinent facts when we discuss the issues on appeal.

In October 2006, defendant and respondent County of Tehama (the County) circulated the final environmental impact report (EIR) for the Sun City-Tehama Project (the Project). The Project proposed the development of an age-restricted golf course community of 3,700 homes on over 3,000 acres, with a commercial center, adjacent to Interstate Highway 5 (I-5) between Red Bluff and Redding.

In January 2007, COF filed the operative pleading, a first amended petition for writ of mandate. In this petition, COF alleged that the County's EIR failed to adequately mitigate (1) the Project's impacts on blue oak woodlands, and (2) the Project's projected traffic increase on I-5. COF requested that the County's approval of the Project be set aside, and that the County and real parties not proceed further on the Project until they complied with CEQA.

The trial court denied COF's petition for writ of mandate.

COF appealed. As relevant at this point, we upheld the EIR's sufficiency with respect to the blue oak woodlands and the I-5 issues, save for one I-5 issue involving an economic standard that was used in determining the Project's I-5 residential-based traffic mitigation fee. On the basis of this one I-5 issue, we reversed the judgment, set aside the Project's approvals, and remanded the matter to the County "for the limited purpose" of considering this issue.

On remand, the County held two public hearings. It then reapproved the Project without any substantive change after finding that the economic standard at issue was appropriate.

The trial court subsequently (1) denied COF's motion for attorney fees under section 1021.5, (2) granted the County's motion to discharge the writ of mandate, and (3) ruled in real parties' favor as to costs.

These are the three issues that COF now raises in the present appeal. We will discuss each in turn.

DISCUSSION

I. COF's Request for Attorney Fees Under Section 1021.5

To encourage private litigants to look after the public interest, section 1021.5 authorizes an award of attorney fees "to a successful party" when "(1) the action 'has resulted in the enforcement of an important right affecting the public interest,' (2) 'a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a

large class of persons,' and (3) 'the necessity and financial burden of private enforcement . . . are such as to make the award appropriate.'" (§ 1021.5; *Serrano v. Stefan Merli Plastering Co., Inc.* (2011) 52 Cal.4th 1018, 1026.)

In determining whether a party has met these requirements, a court "'must realistically assess the litigation and determine from a practical perspective whether the statutory criteria have been met. [Citation.] [A trial court's] decision will be reversed only if there has been a prejudicial abuse of discretion.'" (*Marine Forests Society v. California Coastal Com.* (2008) 160 Cal.App.4th 867, 876.) As we shall explain, the trial court did not abuse its discretion in denying section 1021.5 attorney fees to COF.

As noted, COF filed a petition for writ of mandate alleging two causes of action, namely, the County's EIR failed to adequately mitigate (1) the Project's impacts on blue oak woodlands, and (2) the Project's projected traffic increase on I-5.

As for the cause of action concerning blue oak woodlands, COF lost that one. The EIR noted the Project would eviscerate 774 acres of blue oak woodlands, but required as mitigation a conservation easement preserving nearly twice as many acres of similar oak woodland habitat within the Project's plan area. The EIR concluded that nothing further could be done to render the loss of the *unique* 774 acres of blue oak woodlands an insignificant impact. COF agreed that the ratio of oak woodland

habitat the EIR preserved was an acceptable figure under CEQA case law.

COF claimed, however, that the EIR's characterization of this mitigated impact as "a significant unavoidable impact"—because of the actual net loss of the 774 acres—did not meet the applicable CEQA legal standard of a mitigated impact being "less than significant." In rejecting this claimed distinction, we concluded that, under the circumstances here, the distinction was semantic rather than legal: "The difference turns on whether one chooses to call a net loss of habitat 'a significant unavoidable impact' or to say that conserving sufficient other habitat renders the net loss 'less than significant.' If anything, [the County's] semantic approach may be more true to the spirit of CEQA that environmental impacts should be admitted."

COF's second cause of action, which covered the Project's projected traffic increase on I-5, comprised six allegations. COF lost five of those. The basic issue underlying this cause of action concerned the $3 million fee the EIR required the Project to pay for mitigating the Project's I-5 residential-based freeway traffic impacts (hereafter, the I-5 mitigation fee), and whether the Project was financially able to pay more. Caltrans, at least in one early estimate, thought the I-5 mitigation fee should be much higher.

The five allegations of the second cause of action on which COF lost were:

(1) COF's contention that the I-5 mitigation fee was not supported by sufficient evidence because the fee was based only on the Project's residential revenues without considering its commercial revenues. This contention fell victim to the administrative exhaustion doctrine because no issue concerning a failure to consider commercial revenues was raised in the administrative proceedings. In fact, the EIR considered separately the ability of the Project's commercial revenues and the ability of its residential revenues to support infrastructure costs, and required each realm to pay a traffic impact fee.

(2) The administrative exhaustion doctrine likewise felled COF's contention that the County failed to adequately disclose that a financial feasibility analysis from the Project's residential developer did not consider commercial revenues.

(3) COF's contention that the County itself failed to independently assess the financial feasibility evidence regarding the I-5 mitigation fee. The County properly could rely on its staff's assessment of the Project developer's analysis.

(4) Contrary to COF's claim, the County did not base its finding—that greater mitigation of freeway traffic impacts was infeasible—on the lack of an existing program to fund and implement I-5 improvements.

And, (5) contrary to COF's claim, the County did not have to include all financial feasibility analyses in the EIR itself,

because those analyses were publicly available and included elsewhere in the record before project approval.[2]

That brings us to the sixth allegation of COF's second cause of action, and the only allegation on which COF prevailed, as discussed in the unpublished part of our prior opinion: The County failed to disclose that its economic consultant had expressed skepticism concerning the applicability of an economic standard that was used in substantial part in determining the Project's financial feasibility. The basis of this allegation was as follows.

In determining what the Project could pay toward infrastructure costs, which included the I-5 mitigation fee, the County's EIR relied substantially on a "rule of thumb" standard for residential development. That standard posits that if the total infrastructure cost burden is less than 15 to 20 percent of the finished home price (and preferably on the lower end of that range), then a project is considered to be financially feasible. The County set this infrastructure cost burden for the Project at 14 percent.

In responding to a query from the County in October 2006 regarding the applicability of the 15 to 20 percent standard,

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[2] COF lost on one additional point, which comprised the published portion of our prior opinion. We upheld the trial court's denial of COF's motion to include in the administrative record certain documents the County claimed were within the attorney-client privilege. (*California Oak Foundation v. County of Tehama* (2009) 174 Cal.App.4th 1217, 1220-1223.)

the County's economic consultant stated that the Project had "unique aspects" which rendered "suspect" the application of this "rule of thumb." The consultant explained that while the Project was located far from urban development and therefore required substantial infrastructure investment, "[t]hese costs may be offset by lower land values but that is impossible to say without knowing the price paid for the land by the developer."

The County decided to forego an official comment on this issue for the EIR.

On this basis, we remanded the matter to the County "for the limited purpose of allowing [the County's Board of Supervisors] and the public an opportunity to consider the effect of this evidence [i.e., the October 2006 response from the County's economic consultant] and any further germane showing that it may engender on the issue of the financial feasibility of a greater fee to mitigate traffic impacts on I-5."

On remand, the County held two public hearings in February 2010, considered an array of evidence from all sides, and reapproved the Project in April 2010 without any substantive change. In fact, the County's economic consultant, armed on remand with evidence of the Project's land costs in 2006, concluded that a residential-based infrastructure cost burden of 12 to 15 percent was a reasonable maximum level to impose on the Project; and that, given the substantial decline in home prices

from 2006 to 2010, it was reasonable to assume the Project currently could not afford any additional infrastructure costs.

Now we return to the section 1021.5 criteria. This lengthy background sets the stage for a rather brief analysis of the issue of whether the trial court abused its discretion in denying section 1021.5 attorney fees to COF.

Even if we assume for the sake of argument that COF was "a successful party" under section 1021.5 (notwithstanding its somewhat humble record detailed above), and that COF's action resulted in the "enforcement of an important right affecting the public interest" concerning EIR disclosure, we cannot say, with any shred of intellectual honesty, that the trial court abused its discretion in finding that COF's action did not confer "a significant benefit . . . on the general public or a large class of persons." (§ 1021.5.) Our remand was a limited one on a limited issue. Perhaps that is why the public hearings on the remand were so sparsely attended. After remand, the County arrived at the same position it had arrived at previously. Any realistic assessment of COF's action from a practical perspective shows that the action did not confer a *significant* benefit on the *general public* or a *large class* of persons. (See *Karuk Tribe of Northern California v. California Regional Water Quality Control Bd.* (2010) 183 Cal.App.4th 330, 335-336, 364, 369 [a regional water board providing, pursuant to a "limited remand," an augmented explanation for its prior decision does

not qualify as a "significant benefit" for section 1021.5 purposes].)

We conclude the trial court did not abuse its discretion in denying attorney fees to COF under the private attorney general theory of section 1021.5.

II. The Trial Court's Discharge of the Writ of Mandate

COF contends the trial court erred in discharging the writ of mandate because (1) the County still lacks information about the Project's land costs, which the County's economic consultant said was necessary to determine the applicability of the "rule of thumb" standard of financial feasibility on the issue of the I-5 mitigation fee, and (2) the County's determination on remand—i.e., increasing the I-5 mitigation fee is financially infeasible for the Project—is flawed due to the lack of timely information regarding the Project's commercial revenues. We disagree.

On the first point, the lack of information on the Project's land costs, COF asserts the County on remand did not know the Project's *current* land costs. This assertion is specious. As we alluded to above in part I of the Discussion, the County, on remand, knew the Project's 2006 land costs (corresponding to the County's EIR and project approval in 2006); and, given the evidence on remand of the economic collapse of the relevant housing market between 2006 and the 2010 remand, it was reasonable for the County to conclude that

the Project could not afford any additional infrastructure costs beyond the 2006 mitigation fees.

COF's second point, that the County's I-5 mitigation fee determination was flawed in lacking commercial revenue information, is foreclosed by the administrative exhaustion doctrine. As we noted in part I of the Discussion (see p. 6, *ante*, allegation Nos. (1) & (2)), our prior opinion rejected two similar issues on such grounds.[3]

We conclude the trial court properly discharged the writ of mandate.

III. Costs

COF contends the trial court erred in denying it costs, while awarding to real parties apportioned (10 percent reduced) costs of $25,565 for costs incurred prior to the first appeal.

COF presents three arguments. The third one has some charm.

First, COF contends that it, rather than real parties, was the "prevailing party" entitled to costs. We disagree.

Section 1032, subdivision (a)(4) defines "prevailing party" for purposes of costs, as pertinent: "When any party recovers other than monetary relief and in situations other than as

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[3] In any event, as also noted, the EIR separately considered the ability of the Project's commercial revenues and the ability of its residential revenues to support infrastructure costs, and imposed a traffic impact fee on each realm.

specified [i.e., a party with a net monetary recovery, or a defendant against whom no relief is obtained], the 'prevailing party' shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not and, if allowed[,] may apportion costs between the parties . . . ."

In light of what we said in part I of this opinion, the trial court did not abuse its discretion in finding that real parties prevailed on 90 percent of COF's action. (See *Heller v. Pillsbury Madison & Sutro* (1996) 50 Cal.App.4th 1367, 1395 [applying this standard of review to prevailing party determination].)

Second, COF contends that real parties' 2007 cost memorandum was untimely. Again, we disagree.

A cost memorandum must be filed within 15 days after the trial court clerk mails or serves the notice of entry of judgment, or within 180 days after entry of judgment, whichever is first. (Cal. Rules of Court, rule 3.1700(a)(1).)[4] COF claims that real parties missed the 15-day deadline by one day or one week, depending on the dates the notice of entry of judgment was mailed or served. The trial court, however, found that the "notice" of judgment the clerk mailed or served was a muddled mess, making the 180-day deadline applicable. And, if the 15-day deadline did apply, the trial court, under rule

[4] Further rule references are to the California Rules of Court.

3.1700(b)(3), extended the real parties' time for filing a cost memorandum by 30 days. Finally, if that were not sufficient, the trial court also granted the real parties' motion for relief under section 473. (See 7 Witkin, Cal. Procedure (5th ed. 2008) Judgment, § 141, p. 677 [even if a trial court no longer has discretion to disregard a party's failure to timely file its cost memorandum, the court may grant relief under section 473].) Against this backdrop, the trial court did not err in finding the real parties' 2007 cost memorandum was timely.

COF also claims that real parties' 2010 motion to apportion costs was untimely, rendering their entire cost request untimely. The 2010 motion, however, relates back to the timely 2007 cost memorandum, which had to await the postappeal remand and final judgment in this case.

Third, and finally, COF contends that real parties' requested costs for models, blowups, and photocopies are not recoverable and excessive. We agree in part.

Real parties originally requested $25,824.24 for these costs, consisting of $17,122 for summarizing the administrative record and creating a PowerPoint presentation, and $8,702.24 for trial presentation boards, bench books, and related supplies.

This $25,824.24 cost figure included an amount of $15,771.25 for the following:

An employee of the law firm representing real parties, Darth Vaughn, spent 85.25 hours, at $185 an hour, "reviewing and

summarizing the 41[-]volume, 28,751-page [a]dministrative [r]ecord"; this summary was presented at trial via a PowerPoint presentation and accompanying bench book to assist the trier of fact. As real parties further explained this cost: "It simply takes a significant amount of time to cull through a 41[-]volume, 28,000[-]page record to pick out certain, key facts to be presented to the Court under the relevant Substantial Evidence Standard of review, which requires the County's decision to be upheld by the Court if there is any substantial evidence in the "whole" 41[-]volume record to support it"; in other words, real parties claimed Vaughn had to "Analyze [the] Admin[istrative] Rec[ord]."

At the time Vaughn carried out this review, summary and analysis, he held a juris doctorate degree from the University of Southern California (and had sat for the July 2007 California Bar Exam, which he later learned he passed).

In light of these facts, COF is correct in claiming that it is disingenuous to describe Vaughn's review, summary and analysis at $185 per hour as anything but attorney or paralegal fees, which are not recoverable here as costs. (See *Benson v. Kwikset Corp.* (2007) 152 Cal.App.4th 1254, 1279-1280, reversed on other grounds in *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 337, fn. 3; *Science Applications Internat. Corp. v. Superior Court* (1995) 39 Cal.App.4th 1095, 1104; § 1033.5, subd. (a)(10).) Consequently, this cost, which totals

$15,771.25 ($185/hour x 85.25 hours), must be subtracted from the $25,565 cost award to real parties.

The remainder of real parties' cost award for models, blowups and photocopies of exhibits is allowable, however, as the trial court (trier of fact) did not abuse its discretion in finding the PowerPoint presentation and bench books reasonable in cost and of great help. (§ 1033.5, subd. (a)(12).)

DISPOSITION

The trial court is directed to subtract $15,771.25 from the $25,565 cost award to real parties. In all other respects, the challenged orders are affirmed. Each party shall pay its own costs on appeal. (Rule 8.278(a)(5).)

BUTZ, J.

We concur:

BLEASE, Acting P. J.

ROBIE, J.